SERVED: August 28, 1998

NTSB Order No. EA-4692

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of August, 1998

Petition of ERROL VAN EATON for review of the denial by the Administrator of the Federal Aviation Administration of the issuance of an airman certificate.	Docket CD-32

OPINION AND ORDER

The Administrator has appealed from the written initial decision of Administrative Law Judge William R. Mullins, issued on January 12, 1998, following a short hearing held on August 27, 1997.[1] The law judge granted petitioner's motion for summary judgment, and directed the Administrator to issue the air transport pilot (ATP) certificate for which respondent had re-

[1] The law judge's decision is attached.

applied. We grant the Administrator's appeal, and dismiss.[2]

By decision served March 20, 1996, we affirmed the Administrator's emergency order revoking petitioner's ATP certificate. Petitioner had been an FAA supervisory aviation safety inspector and we found he had intentionally falsified a rating application (a violation of 14 CFR 61.59(a)). Administrator v. Van Eaton, NTSB Order No. EA-4435 (1996) (Van Eaton). In addition, we found that, as a result of the intentional falsification, respondent no longer possessed "good moral character" as required by § 61.151(b). One year following the emergency revocation, petitioner reapplied for an ATP certificate. His application was denied on the grounds that he did not have good moral character, citing 14 CFR 61.151(b) once again, and our decision in Van Eaton, supra.

Petitioner appealed that conclusion to us. Initially, a law judge dismissed the appeal on jurisdictional grounds, under the mistaken belief that pending judicial review of Van Eaton prevented our review of the FAA's action on respondent's re-application.[3] We reversed, directing a decision on the merits. Administrator v. Van Eaton, NTSB Order No. EA-4527 (1997).

On remand, petitioner filed a motion for summary judgment,

[2] Petitioner replied to the Administrator's appeal, but his reply was late. We nevertheless accept it, as doing so works no prejudice on the Administrator. Application of George O. Grant, NTSB Order No. EA-3919 (1993).

[3] Judicial review has since been completed, with the Ninth Circuit affirming our decision. Van Eaton v. FAA, No. 96-70311 (unpublished, served March 13, 1998).

to which the Administrator replied in opposition. The law judge held a short hearing, at which he concluded that petitioner had the burden of going forward and that the parties had agreed there was no need for testimony. Tr. at 12; Initial Decision at 3. He invited the filing of briefs, but took no evidence. It appears to us that the law judge misconstrued the facts of this case, the applicable law, and the positions of the parties.

Those who have had certificates revoked may re-apply for reissuance after 1 year. Petitioner did so. He was told in the May 1996 declination letter that he continued to lack good moral character, based on our earlier opinion affirming the revocation order. Petitioner contended in his motion that the Administrator had failed to produce evidence to demonstrate that he lacked good moral character because the FAA has "consistently presumed that an airman is of good moral character following certificate revocation as soon as he becomes eligible to reapply…". Motion at 6. Petitioner introduced an internal FAA memo, which he read to establish an FAA policy to issue certificates (on re-application) on the expiration of 1 year following revocation. The motion contemplates that the FAA has the burden of proving that a certificate should not be issued.

The Administrator, on the other hand, argues that there is no agency policy or interpretation on this matter; that she wishes to establish such a policy through the adjudication here; and that the policy she wishes to establish would require a case-by-case review of a petitioner's present circumstances, i.e.,

whether petitioner, at the time of re-application, possessed good moral character. At the hearing, counsel for the Administrator expressed it as follows:

> Judge Mullins: I guess the question…[is] how long a period of revocation would the Administrator consider as being sufficient for him to rehabilitate his good moral character?
>
> Mr. Laylin: Whatever time it takes for him to establish that he has, in fact, rehabilitated…. I think that these [issues] have to be addressed on a case-by-case basis.

Tr. at 11. The Administrator alleged that she had evidence demonstrating that petitioner had continued to exhibit a lack of good moral character after Van Eaton.

The law judge found the internal FAA memo to represent past FAA policy and that the FAA here contemplated a change in policy that could not be applied to petitioner. Therefore, the law judge reasoned, in the absence of other evidence of a lack of good moral character, the FAA was required to issue a certificate. The law judge further found that, because her denial letter failed to identify any such disqualifying factors or events, the Administrator was prohibited from raising them now and that the "presumption" of good moral character had not been rebutted.

We see no basis for the law judge to conclude that the internal FAA memo was FAA policy, or policy on which petitioner had a right to rely. The memo -- on its face clearly not official FAA policy -- itself registers uncertainty about the course to take in this situation.

The FAA is entitled to make policy via adjudication. In

such a case, the question for us would be whether the proposed policy conforms with the words of the regulation. If it did, the FAA would be permitted to amend its approach, although a new sanction against the "first" offender could be problematic.[4]

In any case, whether a new policy is being applied here or not, the burden of proof is not on the FAA to demonstrate respondent was still not qualified when he applied. The burden is on petitioner to demonstrate that he was qualified, just as he would do in the event the Administrator had declined to issue a medical certificate. The Administrator may then introduce rebuttal evidence.

In the circumstances, summary judgment should not have been granted. Petitioner did not introduce any facts to establish his qualification. The FAA's interpretation here is due our deference pursuant to 49 U.S.C. 44703(2). It is not inconsistent with the regulation authorizing re-application after 1 year, and is not inconsistent with any other agency policy of which we have been made aware. No purpose would be served by remanding this

[4] We are aware of no reason why the Administrator should or must treat the passage of time as a per se indication of rehabilitation. Further, contrary to the law judge's view, a rulemaking is not required to make enforcement policy. The issue for Administrator v. Miller, NTSB Order No. EA-3581 (1992), was whether in policymaking through adjudication it was appropriate to take suspension action against respondents (as opposed to simply finding the violation) when they had not had notice of the FAA's policy interpretation. Here, that issue does not arise. The evidence does not establish a prior FAA-wide policy that would have led petitioner to expect that he would automatically receive a new certificate, nor is the failure to obtain a benefit (certificate issuance) the same thing as an affirmative sanction such as the certificate suspension at issue in Miller, supra.

case to the law judge. Despite the many filings, the passage of 2 years since petitioner's appeal was filed, and the Administrator's proffer of evidence of petitioner's continuing lack of good moral character, petitioner has neither tendered nor referred to any evidence he would introduce for the opposite proposition. Instead, he has consistently presented strictly legal matters, none of which have merit and none of which address the key factual question before the Administrator and this Board. Thus, we think the better course at this juncture is to dismiss the petition for review. Petitioner is free to re-apply to the FAA at any time, and to tender to the Administrator at that time information he believes warrants a positive assessment of his moral character.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. The decision of the law judge is reversed; and

3. The petition for review is dismissed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.